Editor's note: Reconsideration granted; decision vacated -- See Victor Anahonak (On Remand), 64 IBLA 289 (June 4, 1982)

VICTOR A. ANAHONAK

IBLA 75-296 Decided August 18, 1975

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting Native Allotment application AA-7203.

Reversed and remanded.

1. Alaska: Native Allotments -- Segregation: Filing of Application -- Withdrawals: Generally -- Withdrawals: Effect of

The date of the segregation from settlement, caused by the filing of a State selection application in the appropriate office of the Bureau of Land Management, is not tantamount to the "effective date" of "[a] withdrawal or reservation" described in the Secretarial directive of October 18, 1973. Therefore, Native use and occupancy commenced before such segregation may continue, unhampered by such segregation, to gain the requisite five years' use and occupancy required under 43 U.S.C. §§ 270-1 to 270-3 (1970).

APPEARANCES: James Vollintine, Esq., James Grandjean, Esq., both of Alaska Legal Services Corp., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Victor Anahonak has appealed to the Board of Land Appeals from a decision dated November 29, 1974, rendered by the Alaska State Office, Bureau of Land Management (BLM), rejecting his Native Allotment application AA-7203.

The application, filed March 20, 1972, asserted occupancy of the lands from May 1960 or October 1960.

The decision below recited that: the lands have been segregated from settlement under the public land laws since the filing of State selection applications A-054383 on May 3, 1961, and A-057387 on May 13, 1962; the substantial use and occupancy contemplated by the Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), envisages that the applicant use and occupy the land as an independent citizen for himself or as head of a family and not as a minor child in company with his parents, citing Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974); appellant was born on September 27, 1947, and was thus some 14 years old at the time of the filing of the State selection application and could not have in his own right occupied the lands in issue as an independent citizen or as head of a household prior to the filing of the State selection on May 3, 1961; on June 7, 1974, and August 15, 1974, BLM allowed appellant time to supply additional information to clarify his presumably claimed status as an independent citizen or as head of a household; and appellant did not respond thereto.

[1] The rejection of appellant's application is predicated in part upon the segregation of the lands by the filing of the State selection applications and the finding that appellant was at that time neither an independent person or head of a household.

The pertinent regulation, 43 CFR 2627.4(b), reads as follows:

> (b) Segregative effect of applications. Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the proper office properly describing the lands as provided in § 2627.3(c)(1) (iii), (iv), and (v). Such segregation will automatically terminate unless the State publishes first notice as provided by paragraph (c) of this section within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

The Secretarial Directive of October 18, 1973, as amended May 16, 1975, concerning the adjudication of pending Alaska Native Allotment applications, in pertinent part directs that:

> Vacant, unappropriated and unreserved land in Alaska is available for allotment under the Native Allotment Act. With respect to reserved or withdrawn land, if a native has completed the five-year period

of statutory substantial use and occupancy prior to the effective date of the withdrawal or reservation, the withdrawal may be revoked and the allotment granted. (Emphasis supplied.)

* * * * * * *

1. Where a native has initiated and completed substantial use and occupancy of the land for five years prior to the withdrawal or reservation, the allotment may be granted even though the land is still withdrawn at the time of application. (Emphasis in original.)

2. Where a native has not completed the five-year period of statutory use and occupancy of lands prior to the effective date of a withdrawal or reservation of the lands, the allotment application should be rejected. (Emphasis supplied.)

3. When a Native has initiated use and occupancy of the land prior to the date of classification under the Act of September 19, 1964 (43 U.S.C. 1411-1418), such classification will not constitute a bar to the completion of the statutory five-year use and occupancy period, and the allotment may be granted, even though the classification encompassing the land is still in effect. (Emphasis in original.)

In essence, the directive requires five years of substantial use and occupancy "prior to the effective date of the withdrawal or reservation." (Emphasis supplied.) It is noteworthy that a withdrawal application, when noted on the official records of the appropriate Bureau of Land Management office, "shall temporarily segregate such lands" as provided in § 2091.2-5. 43 CFR 2091.2-5(a) provides:

(a) Application. The noting of the receipt of the application under §§ 2351.1 to 2351.6 in the tract books or on the official plats maintained in the proper office shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be

> suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands.

Thus segregation of land under section 2091.2-5 occurs with the notation of a withdrawal application on the appropriate records; it necessarily precedes the "effective date of the withdrawal or reservation" or of the disposition of land pursuant to a State selection application. A State selection application segregates lands upon its filing. Moreover, a withdrawal becomes effective when it is filed with the Federal Register. Emil I. Stadler, 15 IBLA 180, 181 (1974), citing Solicitor's Opinion, M-36382 (October 24, 1956); Edwards v. Brockbank, A-25960 (April 3, 1951). See 44 U.S.C. § 1507 (1970).

It must be presumed that the directive was made with knowledge of the foregoing principles. To analogize the withdrawal procedure to the state selection procedure, one finds that a withdrawal application, when noted on the appropriate records segregates the land affected thereby from settlement and other appropriations. Similarly, the filing of a state selection application conformable to the regulations, so segregates the land. 43 CFR 2091.6-4. A withdrawal becomes effective, or "final," when it is filed with the Division of the Federal Register. A state selection becomes "final" when it is patented or clearlisted. The segregation in either case precludes the initiation of new settlements. But in no sense does the segregation caused by the filing of a state selection equate with the "effective date of a withdrawal." Thus the Secretary's directive does not foreclose the completion of the five-year period of occupancy, when that occupancy had commenced prior to the segregation of the land. 1/

Ordinarily, we would not condone appellant's failure to supply the data requested by BLM on June 7, 1974, and August 15, 1974. However, the data sought related to his presumably claimed status as an independent citizen or as "the head of a family". 43 CFR 2561.0-3. His claimed occupancy assertedly commenced in 1960, prior to the segregation of the lands from settlement by reason of the filing of the State selection application. It appears that BLM sought the data mentioned above based upon a misconception of the effect of the filing of the State selection application upon appellant's claim. In the circumstances, we shall remand the case for further appropriate consideration.

1/ If appellant can establish his occupancy of the land prior to the filing of the state selection application, the land may not have been subject to selection as "vacant, unappropriated and unreserved" land. See § 6, Alaska Statehood Act of July 7, 1958, 72 Stat. 339, 48 U.S.C. notes prec. § 21 (1970).

Therefore, pursuant to the authority vested in the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded for further consideration.

Frederick Fishman
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Edward W. Stuebing
Administrative Judge